Central Law Journal.

ST. LOUIS, MO., APRIL 23, 1915.

FREEDOM OF SPEECH AND BOARDS OF CENSORS FOR MOTION PICTURE SHOWS.

What a variety of questions are raised under the general clauses of our fundamental law by the ever progressive invention of our people! But as startling a one in its novelty, as we have noted, is that whereby claim is made for freedom of speech in the product of a mechanical device on a curtain in a motion-picture theater.

It is a little difficult to grasp the idea of the personality of an individual displaying itself in what a machine, that is his property, produces to the public eye and apprehension, as its thought and expression of sentiment, even though it connectedly, through its product, "points a moral or adorns a tale." Is the personality ubiquitous through and by machines, if it duplicates, if the word is allowable, the same moral and the same tale contemporaneously in different places? If it could be there, at one and the same time, but without the machine, it would be as if it were not.

But it might be answered, an author's book or our editorial could be all of this, and one copy would be as exempt from suppression as all of them under the great right of liberty of speech, and why not the motion picture?

Mr. Justice McKenna, speaking for a unanimous bench, seems to tell us why books and writings are not like motion pictures. Mutual Film Corp. v. Industrial Com., 35 Sup. Ct. 387.

He says: Moving pictures "indeed may be mediums of thought, but so are many things. So is the theater, the circus and all other shows and spectacles. * * * Counsel have not shrunk from this extension of their contention and cite a case in this court where the title of drama was allowed to pantomime; and such and other spectacles are said by counsel to be publication of ideas, satisfying the definition of the dictionaries, that is a means of making or announcing publicly something that otherwise might have remained private or unknown, and this being peculiarly the purpose and effect of moving pictures, they come directly, it is contended, under the protection of the Ohio Constitution."

Answering this contention, the learned justice says: "The first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong or strained, which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on billboards of our cities and towns, and which regards them as emblems of its public safety, to use the words of Lord Camden, quoted by counsel, and which seek to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion. The judicial sense supporting the common sense of the country is against the contention."

There are then cited cases granting or withholding licenses for theatrical performances and of moving picture exhibitions, and reference is made to the fact that only in this case has it occurred to anybody to suggest that any freedom of opinion has been repressed.

Speaking of these exhibitions generally, it is said: "They are mere representations of events, of ideas, and sentiments published and known; vivid, useful and entertaining, no doubt, but capable of evil, having power for it, and greater because of their attractiveness and manner of exhibition."

These reasons seem more persuasive than convincing, except that to understand what may be included under the general right of freedom of speech we are to look to analogous things which have been regulated notwithstanding such right, for a proper conception of what is embraced in the right.

A man, therefore, under the guise of the exercise of the right of free expression of

his views, may only rely on vehicles of expression which distinctively portray his personality, as the tongue does or as the printing press does. He may be obscene in these things; he may be anarchistic; he may be revolutionary and what he says or does might not be regarded as overt, tangible acts, though, as in print, there may remain the evidence thereof. But, if he inculcates obscenity, anarchy or revolution by motion pictures, he produces something for the other senses than the intellectual sense, which the state in the interest of decency, order and government may regulate or suppress.

And for this the state may appoint its administrative boards and give them large discretion to the end of obtaining results which are the aim of legislation, but not in said boards legislation itself. This case says: "Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative policy may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution."

This is greatly the *argumentum ab inconvenienti*, a salutary but not always a safe rule to go upon. But, if in things subject to the police power, exact limitations on private right, are not accurately marked in legislation, it is well recognized no harm is apt to accrue to fundamental rights.

This case is also instructive in what it says as to the use of films shipped in interstate commerce. It does not precisely represent the common notion of things entering into the mass of local property becoming subject to local control, but it presents a new phase of this subject, as follows: "There must be some time when the films are subject to the law of the state, and necessarily when they are in the hands of the exchanges, ready to be rented to exhibitors or have passed to the latter they are in consumption, and mingled as much as from their nature they can be with other property of the state." It ought to be that a film to be sold for exhibiton ought to be deemed as much in the mass of local property as a barrel of whiskey or a sack of flour in the hands of a local merchant for sale is of such mass. Of course, there are the original package cases, but as to these there was no harm to health or morals except by the exercise of the will in use by individuals. This is not so as to a lewd picture thrown on a canvas before an audience

NOTES OF IMPORTANT DECISIONS

CARRIERS—LIMITATION OF LIABILITY WHEN VALUE STATED IS MERELY ARBITRARY.—The rule of limitation of liability, when the value stated by way of limitation is merely an arbitrary sum bearing no proportion whatever to the value of the shipment lost by a carrier in transportation, was claimed not to apply in Pierce Co. v. Wells-Fargo & Co., 35 Sup. Ct. 351, decided by U. S. Supreme Court.

Frequent decision has established the principle that contracts for limited liability, when fairly made, do not contravene settled principles of the common law preventing a carrier from contracting against its liability for loss by its negligence, the leading case recognizing the validity of such contracts under the Carmack Amendment being Adams Exp. Co. v. Croninger, 226 U. S. 491, 44 L. R. A. (N. S.) 257.

But a dissenting judge in Circuit Court of Appeals, in its ruling in Pierce Co. case *supra*, took the position, that there ought to be some semblance of a valuation, and the statement of an arbitrary sum as damages which has no perceptible relation to actual value—as for example, $50 when a shipment is in actual value $15,000—is in reality no limitation upon liability at all, but, virtually, an absolute release from all liability.

Mr. Justice Day, speaking for eight out of nine of the bench, Justice Pitney dissenting, said: "This argument overlooks the fact that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property. * * * But the contract embodied in the receipt was sustained in the express company cases, because of the

acceptance of the same by the parties as the basis of shipment, and by force of the statute as to the filed tariff and the requirement of the tariff to take notice of its terms and to be bound thereby."

As we understand this ruling, there really was no necessity for the express company to state anything more than a nominal value—say, one cent—in a receipt and the shipper would be bound thereby. But the Interstate Commerce Commission does not seem to think this way, as while the above suit was pending it was ruled that the $50 valuation shall not apply to shipments weighing more than 100 pounds. 28 Inters. Com. Rep. 137, 138. This ruling by the Commission is equivalent to saying the valuation is not merely nominal, but does bear some, though a merely conventional, relation to actual value.

BILLS AND NOTES—ACCEPTANCE AND PAYMENT OF RAISED CHECK NOT PRECLUDING RECOVERY FROM HOLDER.—St. Louis Court of Appeals holds that, though it be true that a drawee bank paying a forged check is precluded from recovering from a holder in due course, this is not true where it pays a raised or altered check. McClendon v. Bank of Advance, 174 S. W. 203.

Admitting the old rule to be true, that money paid in each instance is upon a mistake of fact and the bank is denied recovery under the principle decided in Price v. Neal, 3 Burr 1354, and incorporated in Negotiable Instruments Law, that drawee is bound to know the signature of drawer, and that it has been held that the mistake in the latter case is subject to no such exception, yet it reasonably may be contended, we think, that Negotiable Instruments Law, in its general scope, intended to cover the latter case also.

The learned judge referred to the relevant section of this law, but he does not quote it in full. It reads: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance and admits: (1) The existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument; and, (2) the existence of the payee and his capacity to indorse."

It seems to us that had this section stopped at the word "acceptance," it would be clear that the acceptor would have no recourse against a holder in due course collecting on a raised or altered check. The words which follow in no way limit the instrument according to its tenor and what is stated to be admitted is quoad hoc and fully.

It is familiar that if a bank on which a check is drawn certifies it, instead of paying it, it can interpose no defense to its payment. Carnegie Trust Co. v. First Natl. Bank, N. Y., 107 N. E. 693; 80 Cent. L. J. 231. Certification is but a substitute for payment and has been held to discharge the maker. Payment equally discharges him. R. S. Mo. 1909, § 10089. When these or other of these steps have been taken, it seems to us the Negotiable Instruments Law intends that none of them shall be retraced so far as any innocent holders are concerned. The St. Louis Court of Appeals cites no cases under that law.

In the case before the court, a bank was declared entitled to withhold from a depositor's account a sufficient sum to reimburse it on account of certain raised checks "that is, the amount the respective checks were raised." But if it could not tell when it paid or passed to depositor's account the full amount on the face of these checks, because that seemed according to their tenor, how did it know and in what sums they were raised? It must have been on knowledge or information obtained from the drawer. We do not think it was intended by N. I. L. that payment was to leave open between a bank and an innocent payee or indorsee a possibly disputable fact of this nature.

INDEMNITY INSURANCE—PROOF OF AS IRRELEVANT AND PREJUDICIAL EVIDENCE.—Many courts have decided, that it is prejudice requiring reversal for a trial court to admit evidence of defendant in a negligence case of his carrying liability insurance. West Virginia Supreme Court of Appeals in following such cases says: "The fact that defendant carried accident insurance for its protection could shed no light on the issue of negligence. It might tend to show that it had less incentive to be careful than it otherwise would have had. But the question of motive in a negligence case is not material; the court and jury are concerned only with the question of fact, whether defendant was negligent and not with any motive it may have had for not being sufficiently careful." Walters v. Appalachian Power Co., 84 S. E. 617.

This seems true, but there is an implied admission, that if motive, or recklessness equivalent to motive, as in a claim for punitive damages, is involved, such evidence would be admissible.

It was claimed the evidence was admissible on the ground that defense by the insurer tend-

ed to prove defendant's ownership and control over a certain electric wire that caused the injury sued for, otherwise it was not covered by the policy it held. The court for certain reasons held this was a non sequitur.

It was said, however, that: "Granting that, in negligence cases, the fact that defendant carried accident insurance, may under certain circumstances, be shown, as tending to prove the responsibility of the insured for the proper care and safe management of the agency causing the injury, still one of the essential prerequisites to its admission for that purpose is that the policy be proven to apply to the particular agency, the control or ownership of which the insured denies." In this way many of the cases cited by plaintiff's counsel were distinguished from the case at bar.

In one of them, it was held legitimate cross-examination to test the credibility of defendant's officer to ask him if his company would have to pay any judgment that might be recovered in a case and upon his answering in the affirmative, to ask him for the purpose of contradicting him if some other company would not have to pay the judgment? The first question was allowable to show the interest of witness, and, if answered affirmatively, the second to develop inconsistency in statement. Shoemaker v. Bryant Lumber & Shingle Mill Co., 27 Wash. 637, 68 Pac. 380.

In another case where there was a claim, that an independent contractor, other than defendant, was liable, it was held competent to ask about a policy covering injuries to the plaintiff, because "the jury could very properly infer that the defendants would not have paid for indemnity for damages for which they were not liable." Barg v. Bonsfield, 65 Minn. 355, 68 N. W. 45.

In another case it became material to show that defendants owning a building denied they were in control of the elevator therein, after they had leased apartments therein. It was held proper to allow them to be asked on cross-examination if they did not carry insurance against accidents arising in operating the elevator. Perkins v. Rice, 187 Mass. 28, 72 N. E. 323.

The rule that only the fact of negligence, and not the motive therefor, is of concern to a jury is a narrow one under our system. The second of the cases referred to by counsel for appellee shows that interest may be inquired about on cross-examination as a means of testing credibility, and, furthermore, the jury are instructed not only to consider testimony directly referring to an occurrence but also all surrounding circumstances connected therewith.

SPIRIT OF JUSTICE.*

I

Ah, the pure, vestal call of Justice,
What wonderful legends it tells!
With its breath like a rose's fragrance,
And its voice as of tinkling bells.
Like a page in its virgin whiteness;
Like an infant's life, untold;
Like the dawn of fond hope's brightness,
When wisdom's first leaves unfold.
Ah, the joy of its gentle calling,
How it comes like a magic draught!
Like a wonderful, sweet elixir
From the ghost of wizards quaffed!

O, speak, sweet voice of Justice,
While I, in this spell divine,
May read the glowing message,
That thrills from thy heart to mine.
Come, thou hast passed through fire and revolution,
From Aurora kissed dewy dawn
To balmy twilight eve of Nations;
Through the heart-throbs of every people;
Through the valleys of sin and death;
Oh, tell me the fount of thy cleansing,
Thou Platonic Justice of man to man?

II

I have passed o'er the battle's ravage,
I have borne through the mires of sin;
Through the dark and loathsome prisons,
Where the sun cannot enter in;
I have kissed the lips of the dying,
Ere I bore their souls above;
I have mourned with the sad, in their sighing,
I have joyed with the glad in their love.
As a Seer from the distant ages,
I have lived since the world began;
I have breathed through the countless pages
Of the record of man with man.

Ah, Sir, with the dimmed vision—
When the midnight hour draws near,
And the earth, o'ercharged with ignorance,
Is a-throb in a travail of fear:
Then blacker and blacker the shadows,
And colder and drearer the night,

*This poem will appear in the 1915 Annual "Cardinal" of the University of Arkansas.

Till a new day burst from the heavens,
And the old melts away from sight—
At that crucial hour, I wakened,
Like a soul that is born anew;
Bringing joy to the earth's mistaken,
Bringing courage and hope to you!

III

Thus I learned from the midnight ordeal,
That had passed while the heedless slept;
And I gleaned from crystallized opinions,
How pitiless Logic had swept
The pathway of Justice free from every deception!
And I saw how the mind o'er burdened,
And dwarfed with ignorance's despair,
May be cleansed in the mind's travailing,
Until pure as the morning air!

TROY WILSON LEWIS.

Little Rock, Ark.

STATUS OF EMPLOYES WHILE RIDING IN EMPLOYER'S CONVEYANCE—PART II.*

Railroad employe riding on pass.—Plaintiff was employed by defendant street railway company, and was injured while riding on one of defendant's cars from his place of work to his home for dinner. At the time, he was riding free of charge under a rule of defendant which permitted its employes in uniform to ride free on its cars at any time. It was held that he was a passenger, and in reaching this conclusion the court said: "His time was his own, and he owed the defendant no duties until the time arrived for resuming his work. It was no part of his duty to the defendant, as a servant, to take the car on which he was riding and go to a particular place for his dinner. He might go where he pleased and when he pleased during the interval before coming back to his work. * * * His rights were the same as if, after finishing his day's service, he had taken a car in the evening to visit a friend, or to do any business of his own."[1]

A street car conductor, after finishing his day's work, asked for and received a pass at the company's office, in conformity with a general custom, boarded a car to go home, and gave the conductor of the car his pass. During the trip he was thrown from the car when it struck a curve with great force, and sustained injuries from which he died. The pass on which he was riding contained a stipulation that, "This ticket is issued to the person using the same, only on account of being an employe of the company and is voluntarily accepted as a gratuity." Held, that deceased was a passenger on the car at the time of the accident.[2]

The plaintiff's intestate was employed as an ash hauler at defendant's power plant and was paid $2 a day for his services. His working hours were from 8 a. m. to 5 p. m. It was defendant's custom to supply its employes with badges which entitled them to ride on any of its passenger cars at any time, and even when traveling on their own business or pleasure. On the morning in question deceased was riding, on his badge, to his work, when the car he was on ran into a gravel car and he was killed. The accident occurred between 7 and 8 o'clock. Held, that deceased was a passenger at the time of the accident.[3]

It has been held that a person using a bridge, by virtue of a pass given him by his employer for use in going to and returning from work, was a passenger over the bridge at such times, and was not in the capacity of employe, although the employer was the owner of the bridge.[4]

It will be noticed that in the foregoing illustrations the employe in each instance was engaged in something that concerned

*Part I of this article appeared in last week's issue.

(1) Dickinson v. West End St. R. Co., 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284.

(2) Indianapolis Tr. & Ter. Co. v. Isgrig, (Ind. 1914), 104 N. E. 60.

(3) Harris v. City & E. G. R. Co., 69 W. Va. 65, 70 S. E. 859.

(4) Pembroke v. Hannibal & St. J. R. Co., 32 Ill. App. 61.

himself alone; that is, something not directly in furtherance of his work. He was on his own time, disposing of his time, and acting according to his own free will, uninfluenced by his employer's authority over him. In one instance, it is true, the employe was on his way to work but he was free from the control of his employer. His employer was not concerned with whether he was riding on the street car or walking. The means he employed to get to his place of employment were of his own choosing. A different question is raised where the employe is in the scope of his employment at the time. Then, of course, the relation of master and servant exists. Thus, a civil engineer employed by a railroad company, traveling on the road on duty for the company, and on a pass furnished by the company, occupied the position of an employe at the time.[5]

Transportation part of compensation.—In Eidem v. Chicago, R. I. & P. R. Co.,[6] the law was stated to be that, "The rule is well settled that, as between an employer and employe when the employe receives transportation as a part of his contract of employment, the law requires no more than ordinary or reasonable care on the part of the employer."

A laborer in the employ of an electric railway company was to receive by the terms of his contract of employment, $1.75 a day of 10 hours and daily transportation between the city in which he worked and the town in which he lived, and in accordance therewith he was given two tickets or transportation slips at the end of each day's work. He was injured by the derailment of the car in which he was riding on one of such tickets. It was held that he was a passenger at the time of the accident and entitled to care as such.[7]

Plaintiff was employed as night clerk at defendant's car barns, and received a salary of $70 a month and transportation over the company's lines. In attempting to board one of defendant's cars to return to his duties from his home, where he had gone for lunch, he was injured. Held, that he was a passenger.[8]

An employe of a railway company who was paid for his services partly in passenger tickets, was held to be a passenger while riding on such tickets.[9]

Decisions under the workmen's compensation acts.—Under the system inaugurated by the Workmen's Compensation Acts, the fact that a workman is found to have been acting in the capacity of employe at the time he received an injury generally has the opposite effect to that which it had at the common law. Under the latter system, the effect of finding that an employe was acting as such at the time he was injured, was very frequently to find that his injury was due to the negligence of a fellow servant, which defeated recovery. The Compensation Acts, on the other hand, allow recovery regardless of whether the injury was due to a negligent act of a fellow servant, or whether it was due to the fault of anyone. It is necessary to authorize recovery, however, that the injury occur while the workman was acting within the scope of his employment. The following cases fairly well illustrate the point in question.

A workman in the employ of a railroad company as engine cleaner was ordered to go to a station about four miles distant from the place he had been regularly employed. He was conveyed by the company's trains to and from the station in question without charge. On arriving at the station where he was to work he was told, upon inquiry, that there were two ways to the engine shed, by way of a bridge and by way of a subway. On the second morning upon his arrival at the station, in order to save time, he walked across the tracks to-

(5) Texas & Pac. R. Co. v. Smith, 67 Fed. 524, 31 L. R. A. 321.

(6) 158 Ill. App. 82.

(7) Indiana Union Tr. Co. v. Langley, (Ind. 1912), 98 N. E. 728.

(8) Klinck v. Chicago City R. Co., 262 Ill. 280, 104 N. E. 669.

(9) Enos v. Rhode Island Suburban R. Co., 28 R. I. 291, 67 Atl. 5, 12 L. R. A. (N. S.) 244.

wards the engine shed, and while doing so was killed by a train. It was held that there was evidence that the workman's employment commenced when he got into the train to go to his employment, and that his death was due to an accident arising out of and in the course of his employment.[10]

"It must be remembered," said Smith, L. J., in the case last sighted, "that there is a difference between the beginning of a man's employment and the beginning of his work. In a coal pit, a miner's employment begins as soon as he leaves the bank, although he may have some distance to go to his actual work after he has got down the pit. In the present case I think that it has been proved that it was part of the contract of employment between the company and the deceased workman that they should take him from King's Cross to Hornsey, and back again after the day's work was over."

The owners of a colliery furnished a train, of which they owned the coaches, but which was driven by a railway company, for the purpose of conveying a number of their employes between the colliery and their homes, a distance of several miles. Near the colliery the owners had constructed a platform on property owned by the railroad company which was for the exclusive use of the employes. The train was operated free of charge to the employes, and was run regularly between the home town of the employes and the colliery. An employe was waiting on the platform to get into a return train when he was pushed off and killed by the train. It was held that it was an implied part of the contract of service of these employes that this train should be provided by the employers, and that the colliers should have the right to travel to and fro without charge, and that the employment began when the colliers entered the train in the morning and ceased when they left it in the evening, and that the employers were liable to pay compensation for the death.[11]

"To avoid misconception," said Cozens-Hardy, M. R., "I desire to say that I base my judgment on the implied term of this contract of service, and that it by no means follows that every workman is entitled to the protection of the Act whenever an accident happens to him on his way from his home to his employer's place of business."

A fireman in the employ of a railroad company was entitled to return in the company's train from the end of his run to the station where his run commenced. At the end of his run on the day in question he boarded a train with two other men. He put his basket in the rack, at which time he was standing near the door. No one saw him do anything else, but a crash was heard and the man disappeared. The door was then shut, but the window was open and broken. He was found beside the track where he had fallen, seriously injured, and he died from the effects of the fall. It was admitted by the company that the accident happened in the course of the man's employment, but they contended that there was no evidence that it arose out of the employment. It was held that the evidence was sufficient to justify the County Court Judge in finding that the accident arose out of as well as in the course of the employment.[12]

While being transported to his work in a train by his employers, and shortly before reaching the station where he and other workmen would leave the train, a collier climbed out onto the running board of the coach so as to be ready to jump off as soon as the train arrived at the stopping place. Before the train stopped he fell off and was permanently injured. The County Court Judge held that the workman was riding on the train in the course of his employment,

(10) Holmes v. Great Northern R. Co., 83 L. T. Rep. 44, (1900), 2 Q. B. 409, 16 T. L. Rep. 412, 69 L. J. Q. B. 854, 48 Wkly. Rep. 681, 64 J. P. 582, 2 W. C. Cas. 19.

(11) Cremins v. Guest, 98 L. T. Rep. 335, (1908), 1 K. B. 469, 24 T. L. Rep. 189, 77 L. J. K. B. 326, 1 Butterworth's W. C. Cas. 160.

(12) Pomfret v. Lancashire, etc., R. Co., 89 L. T. Rep. 176, (1903), 2 K. B. 718, 19 T. L. Rep. 649, 52 Wkly. Rep. 66, 5 W. C. Cas. 22.

and therefore he was entitled to compensation. This finding was upheld on appeal.[13]

An engine driver was employed by a firm to go with one of their engines to do threshing and to look out for the employers' business, and to solicit business from farmers. He was paid by the hour. The employers furnished him a bicycle to aid him in his work. After the close of a day's work, and after his payment per hour had ceased, the workman started home, a distance of four miles, on the bicycle, and while riding on the road he was run into by a motor lorry and killed. While the workman was not compelled to use the bicycle, the evidence showed that no workman would work under the same conditions without one. It was held that the accident did not arise in the course of the man's employment, it being no part of his duty to ride home on the bicycle.[14]

The Master of the Rolls (Cozens-Hardy) said, in part: "The workman was under no obligation to his employers after six o'clock in the evening to move away from where he was working and to ride home on his bicycle. I cannot see what importance can be attached to the fact that he was on the bicycle at the time of the accident." Lord Justice Kennedy stated in his opinion that the fact that the use of the particular vehicle was a part of the arrangement and the term of the engagement on which the workman was employed, created considerable difficulty, although he agreed with the Master of the Rolls.

Employe about his own affairs.—In riding on the employer's conveyance the employe may have stepped aside from the duties of his employment to attend to affairs of his own, or to gratify a whim or fancy of the moment. If he is injured while so engaged he cannot recover from the employer on the theory that the latter owed him any duty as employer at the time.

The plaintiff in an action to recover for personal injuries was employed by the defendant railroad company, and his duties were to unload slag from cars in the yards, to roll wheelbarrows, and do various things of that general nature. He and other employes were engaged in unloading a gondola car in a train consisting of three gondola and three box cars. Before this work was completed a switch engine started with the train towards a switch, where the box cars were to be cut out and the gondolas switched back. Plaintiff and his co-laborers boarded the cars, although they did not know where they were going, and while so riding plaintiff was struck by a protruding limb of a tree growing near the track and was dragged from the car and seriously injured. There was evidence that it was a custom of the employes to go from one part of the yards to another on the switch engine and cars, and to ride from one part of the work to another. On this occasion, however, they had no work to do elsewhere. Held, that the plaintiff was not acting within the scope of his employment at the time of the accident, and that the relation of master and servant did not exist at that time. "This action on plaintiff's part," said the court, "was entirely foreign to any duty pertaining to his services, and was not designed in the remotest degree to expedite or facilitate the work in hand, nor any work in the master's behalf. It saved no time, achieved no advantage, and was in no way related to the comfort, convenience, or well-being of plaintiff. It was therefore plainly but a playful mode of passing away a few otherwise idle moments; and while thus indulging his fancy for amusement, and subjecting himself the while to dangers wholly unrelated to his services."[15]

Duty when the relation does not exist.—In a case in which it appeared that a conductor was riding home on an engine after his hours of active work were ended, and was killed by the derailment of the engine, the court said: "Assuming that he, with

(13) Watkins v. Guest, 106 L. T. Rep. 813.
(14) Edwards v. Wingham Agricultural Implement Co., 109 L. T. Rep. 50.

(15) Southern R. Co. v. Bentley, 1 Ala. App. 359, 56 So. 249.

others, had by permission enjoyed the privilege of riding upon the engine towards his home, after his own service had ended, he was but a licensee. Being such, and giving to the evidence all the weight and force that can be properly claimed for it, the standard of duty towards him for his protection would be that the defendant, thus permitting the decedent to ride, would be held only to the exercise of ordinary care, and that the licensee exercises the privilege at his own risk of obvious or patent dangers, and under such conditions the defendant owed him no active duty excepting upon the discovery of his danger."[16]

Plaintiff was employed as an assistant carpenter by defendant in the construction of a power plant. In connection with this work defendant operated a railroad to expedite the handling of dirt. On the occasion in question the plaintiff and several others had been let off a few minutes before the regular quitting time so that they could take some tools to the camp, at which the employes were lodged and boarded, on the company's time. As he was climbing on the engine used on the railroad mentioned, some dirt cars, which had been insecurely stayed, rolled against the engine, and caught and mashed plaintiff's leg. It appeared that plaintiff was sometimes sent to the camp for tools, and that he was always permitted to ride on the engine at such times; and that he had ridden into camp on the engine on former occasions after quitting work. It was held that, regardless of whether the relation of master and servant existed at the time between the plaintiff and defendant, the latter was still under obligation to observe reasonable care for the protection of plaintiff while on his way to camp.[17]

C. P. BERRY.

St. Louis, Mo.

(16) Dodge v. Chicago Great Western R. Co., (Ia., 1914). 146 N. W. 14.

(17) Stone-Webster Eng. Corp. v. Collins, 199 Fed. 581, 118 C. C. A. 55.

DAMAGES—LOSS OF PROFITS.

YAZOO & M. V. R. CO. v. CONSUMERS' ICE & POWER CO.

Supreme Court of Mississippi. March 15, 1915.

67 So. 659.

Unless the profits of a business are so definite and certain that they can be ascertained reasonably by calculation, their losses cannot be allowed as damages at large.

REED, J. This is an action brought by appellee to recover from appellant damages which it is alleged appellee sustained when appellant spiked down and closed for use a spur track that served appellee in its business of shipping ice. The case was tried before the circuit judge, jury being waived. He rendered judgment in favor of appellee in the sum of $700, and appellant appealed.

The proof is sufficient to sustain the finding of the trial judge as to liability.

The track was closed for six days in the latter part of September, 1907. In its declaration, appellees claimed damages from: (1) Loss of gains and profits, $750; (2) loss of services of its president, $100; and, (3) amounts paid for services of attorney and for traveling, hotel, telegraph and other expenses of its attorney and president, $350.

Now as to the proof of damage. We find in the correspondence between the parties that appellee promptly made claim for payment of loss sustained. A few days after the occurrence, in a letter dated September 30, 1907, appellee sent appellant a statement of account, of which the following is a copy:

For loss on account of cutting out siding and failure to place cars for shipment of ice, Sept. 22 to Sept. 27, inclusive:	
Six days' loss at factory, at $30.00 per day	$180.00
Six days' time of W. A. Crawley, at $15.00 per day	90.00
R. R. fare, hotel, telegraph and other incidentals	50.00
Attorney's fees, including hotel, traveling, telegraph and other incidental expenses paid J. W. Cutrer	150.00
	$470.00

Mr. Crawley, president and manager of appellee company, testified that his company was put out of business as far as freight shipments were concerned, and that it would be difficult

to arrive at exact figures as to amount of loss. He said the plant sustained a loss of $100 per day. When asked what expenses were incurred in his effort to have the obstruction removed. he answered:

"Well, I gave it six days of my time; attended to nothing else absolutely; my time, I estimate, was worth at least $15 a day—$90. I paid out for railroad fare, hotel, telegraph, and other incidentals, $50; then there is an attorney's fee, including hotel, travel, and stenographer and other incidental expenses; paid J. W. Cutrer $150; those three items make $290 expenses."

It seems from the evidence that the loss claimed was from the inability to ship bulk ice in cars which were brought to the factory over the spur track. No effort was made to take the ice to the railroad depot and there ship it. Nothing was done towards shipping except to ask that cars be placed on the track at the factory.

Mr. Crawley said that he arrived at the amount of loss of $100 per day by a mental calculation. He said this is what the company ought to have earned on its shipments. This estimate included his expenses. He did not know that the company's books would show a clear profit of $100 per day on any six days in September, 1907. Some ice was manufactured during the time. He could not say the amount. The books would show. The company's books covering the term were not introduced; they could not be found. He could not mention any particular order that he had, about that time, to be filled, but says the factory was selling its capacity during September. When asked if business was not lighter because the weather was getting cooler in the last of September, he answered, "No, sir; September we regard as one of our best ice months; everbody is having chills and fever, and then it is hot."

Mr. Steve Castleman testified for plaintiff. He said that he could not swear positively what the actual loss to the business from the closing of the spur track was, but that he had had several years' experience with the business, and from his knowledge of it, it would be anywhere from $100 to $150 a day.

Mr. Bradley, a witness for appellant, and railroad agent at Belzoni where the ice factory was located, testified that appellee's shipments of bulk ice would not average a small car a day, such car containing about 6,000 pounds. There was no other evidence as to this.

Mr. Crawley testified that the prices for ice during September, 1907, varied from $5 to $8 per ton. He could not tell what sales he had on which the factory could not fill during the six days the track was closed.

It is evident that only compensatory damages were awarded in this case. In truth, the proof does not present a case for punitive damages.

[1] The rule regarding the recovery of gains and profits lost through breach of contract was announced in the case of Railroad Company v. Ragsdale, 46 Miss. 483, and reannounced in the recent case of Crystal Ice Co. v. Holliday, 64 South. 658, and is:

"Losses of profits in a business cannot be allowed, unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation."

[2] The amount of the loss in gains and profits cannot be definitely ascertained from the evidence in this case. The proof is insufficient to establish with certainty the amount of such loss by appellee on account of the failure by appellant to operate and use the spur track. In the proof appellee claimed that the loss arising from the closing of the ice plant for six days amounted to $100 per day. It will be seen that this was only an estimate; that it was not shown from the company's books; the president said it was his mental calculation. He also said that the estimate included his expenses, though he testified that his expenses during the time were included in another item of damages. He could not mention any particular order that his company was unable to fill. In short, the testimony lacks necessary information from which a calculation could be made of the amount of loss sustained.

The only witness who testified on the subject of the amount of the company's shipments said that the company's shipments would not average one small car of bulk ice a day, such car containing about 6,000 pounds, and it is shown in the president's testimony that the company was selling ice at prices from $5 to $8 per ton. It is not shown what profits would be on the sale of ice shipped. Work in the ice plant was not suspended entirely during the six days, but its work and business continued, and the loss claimed was from the inability to ship ice in bulk in cars placed at the plant over the spur track.

We note, too, that in the declaration the loss of gains and profits was placed at $750 for the six days; that in the account rendered on September 30, 1907, the loss was shown to be $30 per day, or a total of $180, and in the testimony by the president it was estimated at $100 a day, and still another estimate was given in the testimony of Mr. Castleman, when he

placed the loss at from $100 to $150 a day. We do not see how the loss could be ascertained reasonably by calculation from the uncertain and indefinite testimony on the subject and the conflicting estimates given.

(3) In its claim for damages appellee includes an amount paid for services and advice of an attorney in its negotiations with appellant for reopening the spur track. It is the general rule that attorney's fees should not be recovered as part of damages unless the wrong or injury complained of is connected with some circumstance of aggravation or malice. 13 Cyc. 80.

(4) It is the rule in Mississippi that attorney's fees can be awarded in cases in which exemplary damages are given. This is supported by the decision in the case of New Orleans J. &. G. N. R. R. Co. v. Albritton, 38 Miss. 243, 75 Am. Dec. 98:

"In cases, proper for the infliction of exemplary damages, the jury in estimating those damages have a right to take into consideration the probable expense of the litigation, to which the plaintiff has been subjected, in order to obtain redress for the wrongful act of the defendant; and it is therefore competent for the plaintiff to prove, before the jury in such a case, the reasonable and proper charges of his counsel."

The case at bar is not one for exemplary damages, and we, therefore, conclude that the amount paid the attorney for advice and services was not a proper item of damages.

(5) From the proof in this case we do not see that the claim for services of the president for six days at $15 per day should have been allowed. It is not shown that the services he rendered in adjusting with appellant the matter in regard to the closing of the spur track were outside the scope of his official duties and were an extra or additional expense to the company.

It follows, therefore, from our holding that the trial court was in error in fixing damages in this case.

Reversed and remanded.

COOK, J., took no part in this case.

NOTE.—*Rule for Estimating as Damages Loss of Profits in a Business.*—We may agree that to recover for loss of profits in a business, these profits must be founded on something other than jecture, or on hope; that they must be taken out of the realm of mere speculation, but what is the recognized basis for estimation entitling one whose business has been broken up or adversely affected by a tort or a breach of contract?

It may be said generally that there is a more liberal rule in recovery of lost profits in tort cases than in contract cases, because in the latter there must be something in the way of contemplation in the minds of the contracting parties upon which the loss can be predicated, while in the former, there is only the consideration of proximate cause. Atkinson v. Morse, 63 Mich. 276, 29 N. W. 711; Terre Haute v. Hiednut, 112 Ind. 542, 13 N. E. 686; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; Squire v. W. U. Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Gas Ill. Co. v. Western, etc., Co., 152 U. S. 200, 38 L. ed. 411.

Not always, however, is there a hard and fast rule for estimating profits, but they are to be determined according to circumstances. Silberstein v. News-Tribune Co., 68 Minn. 430, 71 N. W. 622; Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045, 9. L. R. A. 807.

When the loss of profits is in trade or business, it is generally required that the trade or business must be one previously established and it must show a productiveness in the past and a fair prospect for the future of this productiveness continuing. Terre Haute v. Hiednut, *supra*; N. J. Express Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Bogart v. Pitchless Lumber Co., 72 Wash. 417, 130 Pac. 490.

But even this rule has its limitations according to the character of the business. For example, lost profits from continuing manufacture of machines. Jones v. Call, 96 N. C. 337, 2 S. E. 647, 60 Am. Rep. 416.

Where a business has not been entered on in pursuance to a contract, breach of such contract offers no basis for recovery of damages. Thus in Webster v. Bean, 77 Wash. 444, 137 Pac. 1013, it was said: "A clear distinction is manifest between an interruption of an injury to an existing business, which has been successfully conducted for a considerable period of time and the prevention of the establishment of an entirely new business. When the business is in contemplation, but not established, profits that may be anticipated therefrom are too speculative, uncertain and conjectural to become the basis for the recovery of damages in an action for the subsequent loss of such profits."

This principle has been applied, where there was breach of contract to erect in an office building an elevator. Winslow Elevator Co. v. Hoffman, 107 Md. 621, 637, 69 Atl. 394, 17 L. R. A. (N. S.) 1130. It was said the profits in such case depended upon: "What rent they might have received from the building as not only dependent upon collateral engagements with persons who might rent rooms, but upon many other considerations, such as location, desirability of rooms, amount of rent asked, light and air, competition of other buildings, the number of tenants, the ability of the owners to keep the rooms occupied and the general character of the management of the building. There are so many elements of uncertainty which enter into and affect the question that any estimate of loss could be little short of a guess."

But if an agreement for a share in the profits of an enterprise is breached, it is not conclusive against recovery of profits, that they cannot be definitely shown in advance of the enterprise being ended. One may wait until the business is completed and the profit realized and sue for his share. Dennis v. Maxfield, 10 Allen (Mass.) 138.

As to new business, the principle in Webster v. Bean, *supra*, seems supported also by the following cases: Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244; Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598.

A case under the rule of past profits being the basis for recovery of lost profits is well illustrated in Pipolo v. Ley & Co., 216 Mass. 246, 103 N. E. 475, where a corporation made an agreement with a woman giving her the exclusive privilege of supplying to workmen cooking their own meals the furnishing of provisions during certain work being done. The corporation failing to keep its contract, it was said: "The effect upon plaintiff's business, which had been established on defendant's promise, was disastrous. Her patronage gradually diminished until from the reduced number of men, the expense of maintenance exceeded profits." It was said the damages for loss of future profits were supported by substantial evidence.

This was based on Nelson Theatre Co. v. Nelson, 216 Mass. 30, 103 N. E.—which allowed the lessee of a theater wrongfully expelled therefrom by lessor to recover for loss of profits, it being shown what were his gross receipts and net profits by plaintiff of the prior year and it being shown by persons of large experience, that these would have continued as before.

But evidence of past profits is not conclusive, but only advisory to the jury. Bagley v. Smith, 10 N. Y. 489, 498; Maguire v. Kiesel, 86 Conn. 453, 461, 85 Atl. 689. C.

ITEMS OF PROFESSIONAL INTEREST.

GEORGE WHITELOCK—THE EFFICIENT SECRETARY OF THE AMERICAN BAR ASSOCIATION.

Readers who have become interested in our short biographical sketches concerning the leaders of professional movements in this country, have no doubt been expecting a reference to the professional work of the general secretary of the American Bar Association, Mr. George Whitelock, of Baltimore, whose portrait appears on our front cover page.

Born in 1854 in the city of Baltimore, and graduating from the law department of the University of Maryland in 1875, Mr. Whitelock began his professional career in 1876, as a member of the firm of Schmucker & Whitelock, which firm continued until 1898. A few years later there was formed the partnership of Whitelock, Deming & Kemp, which still continues.

Mr. Whitelock has been ever since his admission an indefatigable practitioner, both in litigated and office work. His activities in behalf of his profession have extended over many years. He has served successively as treasurer and as president of the Maryland State Bar Association; as a member from the United States in the International Law Association (for which he has prepared a number of formal papers); and since 1909 as secretary of the American Bar Association.

Mr. Whitelock has since 1908 represented his state on the Commission on Uniform State Laws, in which service he has participated in preparing and securing the enactment of the various Uniform Acts recommended by this Commission. So successful have been the efforts of Mr. Whitelock and his fellow commissioners from Maryland that all the Uniform Commercial Acts approved by the Commission (except the Partnership Act, recommended in 1914) have not only been placed on the statute books of their own state, but Maryland has the distinction of having given to the work of the Commission a "broader approval" than any other state except Massachusetts.

Mr. Whitelock also served as a member of the Committee on Revision of the Federal Equity Rules, appointed by the Circuit Court of Appeals of the Fourth Circuit, by request of the Supreme Court, and a few years ago was appointed by the governor of Maryland one of a commission to frame a Workmen's Compensation Act for that state.

As a member of the Maritime Law Association, as well as of the American Bar Association, Mr. Whitelock has taken much interest in the efforts of the two associations to correct the defects in the present federal law respecting damages for death by negligence at sea. The Titanic disaster brought the subject prominently before the people of this country, and Mr. Whitelock and those interested with him in the reform of the law on this subject secured the passage of the Peters' Bill by the last House of Representatives, giving a right of action to the personal representatives of one losing his life by reason of some wrongful act, neglect or default at sea or on the Great Lakes or on navigable waters of the United States. This bill failed to reach a vote in the Senate, and this important reform is still pending.

To show the thorough and zealous manner in which Mr. Whitelock carries out any professional trust committed to him, we quote from a recent paper prepared by him for the International Law Association to have been held at The Hague in September, 1914, but which, on account of the war, did not convene. Mr. Whitelock said in this paper:

"Six years ago I sought to demonstrate the need of a remedial statute by Congress to assimilate the law of the United States to that of Europe in respect of the right of dependents to recover damages for death of a relative by negligence at sea. It is not expedient to repeat my reasons here.

"Since my original address was delivered at Buda-Pesth, the Maritime Law Association of the United States and the American Bar Association have continued their earnest advocacy of the proposed reform, the arguments for which have been so tragically reinforced by the case of the Titanic. The American Congress seems at last aroused; and it is believed that the Peters Bill, introduced on June 17, 1913, in the House of Representatives, and favorably reported with amendments from the Judiciary Committee on December 22, 1913, will be duly enacted as the law of the American Courts of Admiralty. It is entitled, 'A Bill Relating to the Maintenance of Actions for Death on the High Seas and other Navigable Waters.' (6.)

"But it is obvious, I think, that neither the foreign law nor an American statute can do adequate justice in American courts so long as the standard established by the Act of 1851, furnishes the limit of a shipowner's liability. The subject of the limitation thereof has been considered in international conference and the draft of an international convention has been already distributed. That draft looks to international unification of the rules relating to the limitation of shipowners' liability in the case of sea-going vessels; the only method by which justice can be rendered both exact and uniform. In this reform, too, the Maritime Law Association of the United States is actively interesting itself. An able committee was appointed at its last meeting in New York on May 1, 1914, to consider the general subject of limitation of the liability of shipowners with special reference to the proposed draft convention and to report thereon to the association. This great and salutary reform is at least in posse."

BOOKS RECEIVED

The Law of Arrest in Civil and Criminal Actions. By Harvey Cortlandt Voorhees, of the Boston bar. Second edition. Price, $3.00. Boston. Little, Brown & Co. 1915. Review will follow.

The Validity of Rate Regulations, State and Federal. By Robert P. Reeder of the Philadelphia bar. Price, $5.00. Philadelphia. T. & J. W. Johnson Co., 1914. Review will follow.

HUMOR OF THE LAW.

Counsel—"May it please your Worship, I brought this man from jail on a habeas corpus."

Spectator (at the back)—"There's a bloomin' whopper for yer! Why, I m'self seed the pore fellow come in a taxi."—Law Student's Helper.

The other day there was a ten-year-old black boy before Judge William Greer, of Macon, Mo., charged with stealing railroad brass. He had been in numerous scrapes before for petty thieving. The kind-hearted judge didn't like to send such a little chap to jail, and yet he felt society demanded some protection from his pernicious activity. So he adjusted the judicial specs and began to dig into a large yellow book. In the rear of the court room was a big black woman, with a red handkerchief about her shiny brow. Noticing the learned judge's perplexity she got up and waddled forward.

"'scuse me, honerable jedge," she said, "fer buttin' in, but if yo'll lemme I kin give yo' some advice about dis case."

The judge looked up with a frown.

"Who are you?" he sternly demanded. "And what have you got to do with this case?"

"Not a thing—not a thing on earth," she hastened to explain. "I'm dat kid's mudder—dat's all."

"Ah!"

The judge closed his book with a bang, and took off his specs.

"And what would you advise?" he asked.

"Strap oil, an' if yo'll git the rawhide I'll 'ply it right in dis heah co't."

The judicial features relaxed. There was nothing between the covers of his book that fit the case so well. He looked over at the attorney for the railroad, who smiled and nodded assent.

"Mr. Constable," directed the judge; "here's a quarter; run and get me a whip."

The instrument of punishment was brought in. The mother took it, grabbed her wayward son and threw him across her knees. For fully ten minutes there was more noise in Judge Greer's normally solemn court than a steam calliope in good health could have made. Lawyers and spectators crowded close to see the show. The mother applied the remedy remorselessly, and at last the constable had to take the whip from her to prevent murder.

"Madame,——"

"My name's Malinda Johnston Washington, jege," panted the executioner.

"Mrs. Malinda Johnston Washington," said the judge, "the court takes off his hat to you. Your advice has been of more benefit to me than all I've received from these lawyers in a year."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

Alabama.....99, 100, 101, 106, 109, 120
Arkansas.....93
California.....23, 26, 37, 49, 53 105, 121
Florida.....113
Indiana.....33, 48, 51, 69, 81, 95
Kansas.....19
Kentucky....3, 12, 15, 18, 20, 39. 52, 56, 59, 79, 86, 119.
Louisiana.....32, 38, 62, 75, 97
Maryland.....118
Massachusetts.....13, 76, 111
Missouri..6, 7, 8, 16, 17, 31, 34, 35, 36, 40, 41, 45 47, 54, 61, 68, 71, 73, 74, 83, 89, 90, 91, 92, 96 115, 122.
New York.....42
North Carolina.....110
North Dakota.....117
Oklahoma.....58
Tennessee.....9, 10, 22. 29, 44, 57, 64, 85, 102, 103
Texas....1, 11, 14, 24, 27, 50, 63. 65, 66, 67, 72, 94 104, 107, 108, 114, 123.
U. S. C. C. App......4, 25, 60, 77, 80, 82, 88, 98
United States D. C......21, 28, 30, 46, 55, 70, 78, 116
United States S. C......112
Washington.....2, 5, 43, 84, 87

1. **Adultery**—Evidence.—In a prosecution for adultery with defendant's wife's niece, evidence that she had gone from his home to a home for fallen girls and there given birth to a baby is admissible to show intercourse between her and some man.—Bodkins v. State., Tex., 172 S. W. 216.

2. **Adverse Possession**—Acquirement of Title—Title by adverse possession cannot be acquired by a municipality holding property in a governmental capacity for public purposes, under statute of limitations.—Gustaveson v. Dwyer, Wash., 145 Pac. 458.

3.——Color of Title.—A void deed under which the grantee therein claims possession is sufficient to show the nature and extent of his possession, and limitations run from the date of his entry into possession.—Big Sandy Co. v. Ramey, Ky., 172 S. W. 508.

4. **Assignments**—Coupled with Interest.—An equitable assignment by transfer to claimant of an account for goods sold, as security for a loan to the transferror, held to vest claimant with a power coupled with an interest in the account assigned, which was irrevocable.—Curtis v. Walpole Tire & Rubber Co., U. S. C. C. A., 218 Fed. 145.

5. **Asylums**—Release of Patient.—Superintendent of state hospital for insane, permitted by Rem. & Bal. Code § 5967, to release patients in his discretion, who released insane person on his mother's undertaking to be responsible for his actions, held not liable in damages to one thereafter shot by such insane person.—Emery v. Littlejohn, Wash., 145 Pac. 423.

6. **Attorney and Client**—Employment.—The hiring of an attorney for the ensuing year, or until the next annual meeting of stockholders, was for a definite time, limited to the earlier date, unless at that time both parties agreed to the later date.—Davis v. Pioneer Life Ins. Co. of America, Mo., 172 S. W. 67.

7. **Bail**—Scire Facias.—Where the principal on a bail bond was not served with scire facias, failure to dismiss as to him before rendering judgment against the surety, who was served, did not invalidate the judgment.—State v. Lacker, Mo., 172 S. W. 369.

8. **Bankruptcy**—Exemption.—In view of Bankr. Act, §§ 67e, 70a, section 67f does not invalididate a contract lien on exempt property, whether the state laws specifically exempt the property or allow the bankrupt to select property to a specified value.—Bank of Mendon v. Mell, Mo., 172 S. W. 484.

9. **Banks and Banking**—Reception of Deposits.—A person having the control of a bank within the statute forbidding the receiving of deposits knowing the bank to be insolvent must know the condition of the assets, so far as possible by the exercise of diligence.—Gass v. State, Tenn., 172 S. W. 305.

10.——Sales of Stock.—A stockholder of a bank selling his stock to the president individually, who used the funds of the bank and gave the stockholder credit on the books of the bank, held not liable to bank creditors.—Green v. Ashe, Tenn., 172 S. W. 293.

11. **Brokers**—Pleadings.—A petition in a broker's action, which alleges employment to procure a purchaser for a specified price and the procuring of a customer to whom the owner sold for a less price to deprive the broker of compensation, justifies a recovery of reasonable compensation.—Martin v. Jeffries, Tex., 172 S. W. 148.

12. **Burglary**—Burden of Proof.—In a trial for housebreaking, the jury must believe that defendant took, stole, and carried away some of the articles designated.—Wallace v. Commonwealth, Ky., 172 S. W. 118.

13. **Carriers of Goods**—Delay.—Delay of a shipment which the consignee notified the consignor would not be accepted is not for that reason excused.—Ideal Leather Goods Co. v. Eastern S. S. Corporation, Mass., 107 N. E. 525.

14. **Carriers of Live Stock**—Contributory Negligence.—A shipper of cattle held not guilty of contributory negligence in failng to take them from the railroad pens and drive them to a watering place, where the train was late.—San Antonio, U. & G. Ry. Co. v. Storey, Tex., 172 S. W. 188.

15. **Carriers of Passengers**—Burden of Proof.—Where a passenger is injured as a result of the wrecking of the car in which he is riding, the burden is on the carrier to show that the utmost skill and foresight could not have prevented the accident.—Louisville & N. R. Co. v. Mitchell, Ky., 172 S. W. 527.

16.——Discrimination.—The one-cent militia fare law (Rev. St. 1909, § 8396) is not in violation of Const. art. 12, § 23, forbidding discrimination between or in favor of transportation companies and individuals.—State v. Missouri, K. & T. Ry. Co., Mo., 172 S. W. 35.

17.——Punitive Damages.—Where a woman gave the conductor her ticket, and he made her pay a second time, threatened to put her off the train, and maliciously used insulting language to her, she was entitled to punitive damages.—Cook v. Lusk, Mo., 172 S. W. 81.

18.——Regulations.—A passenger is bound by the reasonable regulations of a railroad company as to the stopping of its trains, although the ticket agent may obligate the company to stop at a particular station.—Louisville & N. R. Co. v. Gaddie, Ky., 172 S. W. 514.

19. **Chattel Mortgages**—Conversion.—Where a creditor, after receiving goods under an agreement to sell same, pay the debts, and return the surplus, mingled them with his own and sold them without keeping an account, it

amounted to a conversion.—Boam v. Cohen, Kan., 145 Pac. 559.

20. **Commerce**—Federal Employers' Liability Act.—A laborer on the trestle used by a railroad for interstate commerce, held an employe engaged in interstate commerce, within the Federal Employers' Liability Act, when walking along the tracks to boarding cars.—Louisville & Nashville Railway Co. v. Walker's Adm'r., Ky., 172 S. W. 517.

21.——Franchise Taxes.—Rev. St. Tex. 1911, arts. 3837, 7394, attempting to impose on foreign corporations franchise taxes for the right to do business in Texas, consisting of a percentage of capital and surplus, whether within or without the state, held unconstitutional.—Crane Co. v. Looney, U. S. D. C., 218 Fed. 260.

22. **Constitutional Law**—Practice.—The court will not refuse to consider the constitutionality of a statute merely because it is old, and numerous property rights may have been based on it; it not appearing it has ever been before the court or acted on in any way.—McCamey v. Cummings, Tenn., 172 S. W. 311.

23. **Contempt**—Injunction.—One acquiring the property of a plaintiff who had obtained a judgment establishing water rights with a perpetual injunction may initiate contempt proceedings for a violation of the injunction.—Gale v. Tuolumne County Water Co., Ca., 145 Pac. 532.

24. **Contracts**—Demurrer.—A petition, in an action for compensation for plans for fixtures for a building, alleging that defendant accepted the plans as satisfactory, states a cause of action as against a demurrer, though the plans should be to the satisfaction of defendant.—Scarbrough v. Wheeler, Tex., 172 S. W. 196.

25.——Evidence.—Where defendant contracted to pay $25,000 if a fuse plant was found after a year to be worth $175,000 according to a certain test, defendant having made the test impossible by selling the plant, plaintiff could prove its value by other means.—E. I. Du Pont de Nemours Powder Co. v. Schlottman, U. S. C. C. A., 218 Fed. 353.

26.——Rescission.—A party having the right to rescind a contract by reason of the breach by the other party must exercise such right with reasonable promptness, and, if with knowledge of the fact he continues to accept payments due under the contract, the right to rescind is barred.—In re Warner's Estate, Cal., 145 Pac. 504.

27.——Setting Aside.—That one party drew up the contract with a certain stipulation, and that the adverse party did not know that it was inserted, does not justify the setting aside of the contract.—Parker v. Schrimsher, Tex., 172 S. W. 165.

28. **Corporations**—Privilege Tax.—A state may impose on particular classes of foreign corporations a franchise or privilege tax as a condition to their right to do business within the state.—Crane Co. v. Looney, U. S. D. C., 218 Fed. 260.

29.——Stockholder Liability.—A stockholder selling his stock to the president of the corporation, who used the funds of the corporation to pay therefore, and who sold the stock the next day at the same price, held not liable to creditors on the insolvency of the corporation.—Green v. Ashe, Tenn., 172 S. W. 293.

30. **Courts**—Jurisdiction.—A federal court of equity held to have jurisdiction to determine the validity of an asignment of an interest in a distributive share of an estate, and to make such decree as would establish the rights of the assignee, which might be recognized and enforced by the probate court.—Gatzert v. Lucey, U. S. D. C., 218 Fed. 395.

31. **Covenants**—Defense.—In an action by a a grantee against his grantor for breach of a covenant to pay a mortgage debt and release the land from a deed of trust, it was no defense that the deed of trust covered other lands and defendant had paid or tendered his pro rata share of the debt.—Adkinson v. McKay, Mo., 172 S. W. 83.

32. **Criminal Law**—Verdict.—Where the jury's intention is obvious but imperfectly expressed, the verdict may be put in proper form by the clerk and affirmed, as perfected by the polling of the jury.—State v. Hightower, La., 67 So. 13.

33. **Damages**—Deduction.—Where an injured servant exercised reasonable care in selecting a surgeon, defendant was not entitled to deduction from damages sustained by reason of any unskillfulness of the surgeon.—Suelzer v. Carpenter, Ind., 107 N. E. 467.

34.——Instructions.—An instruction, in an action for injury causing loss of an eye, which directs the jury to assess damages in the sum which will compensate plaintiff for the loss, does not authorize a recovery for loss of earnings, and a party desiring an instruction thereon must request it.—Jorkiewicz v. American Brake Co., Mo., 172 S. W. 441.

35.——Measure of.—Where plaintiff failed to secure a contract for personal services because of defendant's default, plaintiff's measure of damages was the amount he would have received, less the cost of performing the contract and what he obtained in other employment during the term.—Hicks v. National Surety Co., Mo., 172 S. W. 489.

36. **Deeds**—Beneficial Title.—Where a voluntary conveyance was not intended to convey the beneficial title to the grantee, who for some time had no knowledge of the deed, the beneficial title remained in the grantor as between the parties.—Cooper v. Newell, Mo., 172 S. W. 326.

37.——Delivery.—To constitute a delivery of a deed a manual tradition of the instrument is not sufficient unless accompanied by the intent of presently transferring title and unhampered by the reservation of a right of revocation or recall.—Bais v. Reed, Cal., 145 Pac. 516.

38. **Descent and Distribution**—Universal Legatee.—A succession is acquired by an instituted heir or universal legatee by operation of law at the instant of testator's death, without any legal proceedings or taking of possession.—Succession of Reilly, La., 67 So. 27.

39. **Disorderly Conduct**—Defense.—One cannot defeat a prosecution of the offense of using insulting language to provoke an assault punishable by Ky. St. § 1271, by showing that the person to whom the language was used was at the same time guilty of the offense.—Bruce v. Scully, Ky. 172 S. W. 530.

40. **Drains**—Public Policy.—It would be against public policy to permit the destruction of a drainage district corporation merely because those who were active in its creation made improvident statements as to cost and location.—Carder v. Fabius River Drainage Dist. No. 3, Mo., 172 S. W. 13.

41. **Electricity**—Instructions.—Where petition contained general allegation of negligence, and also alleged specifically that insulation of electric light wire was worn, instruction held erronous, as applying the doctrine of res ipsa loquitur, and not requiring a finding of the specific acts of negligence alleged.—May v. City of Hannibal, Mo., 172 S. W. 471.

42.——Respondeat Superior.—A railway company held not liable for the death of a telephone lineman by coming in contact with a guy wire on a telephone pole charged with electricity from a feed wire of the railway company, where the guy wire was put up by the telephone company.—Magee v. New York Telephone Co., N. Y., 107 N. E. 493.

43. **Eminent Domain**—Public Service Corporation.—Public service corporations having power of eminent domain may determine the location of their works for which land is sought to be condemned.—State v. Superior Court of Thurston County, Wash., 145 Pac. 421.

44. **Estoppel**—Assignment.—One who, for a consideration, signs a contract by which another assigns right to use trade-names, and likewise one claiming under him, is estopped to question the title of the assignor and assignee.—Sanford-Day Iron Works v. Enterprise Foundry & Machine Works, Tenn., 172 S. W. 537.

45. **Evidence**—Judicial Notice.—The court judicially knows that the organized militia of the state, when traveling on orders from the Governor, travels at the expense of the state.—State v. Missouri, K. & T. Ry. Co., Mo., 172 S. W. 35.

46. **Extradition**—Requisition.—The Governor of an asylumn state, on whom requisition is made for the surrender of an alleged fugitive from justice, is not required to hear the prisoner before ordering his removal.—Ex parte Chung Kin Tow, U. S. D. C., 218 Fed. 185.

47. **Forcible Entry and Detainer**—Action.—A city removing, from a public wharf, lumber obstructing it, after giving notice to the owner to remove it, does not use force and violence, within the forcible entry and detainer statute.—Hafner Mfg. Co. v. City of St. Louis, Mo., 172 S. W. 28.

48.——Intimidation.—A forcible entry of lands means more than a mere trespass, and does not exist in the absence of actual violence or a show of force reasonably calculated to intimidate the rightful owners.—Hammond Savings & Trust Co. v. Boney, Ind., 107 N. E. 480.

49. **Fraud**—Fiduciary Relation.—The relationship alone of sister and brother does not create a fiduciary relation, and the sister, who is an adult, may purchase the interest of the infant brother at a sale ordered by the court.—Westergreen v. Beer, Cal., 145 Pac. 543.

50. **Fraudulent Conveyances**—Separate property.—Though some of the property conveyed by a debtor was his wife's separate property, held, that a creditor might attack the conveyance as to property belonging to the debtor.—Citizens' State Bank v. McShan, Tex., 172 S. W. 565.

51. **Guardian and Ward**—Jurisdiction of Courts.—Courts are the overguardians of all infants whose estates are intrusted to them, and mere technicalities will not warrant the court in upholding the sale of the ward's property resulting in wrong and injustice to the ward.—Gillispie v. Darroch, Ind., 107 N. E. 475.

52. **Homicide**—Self Defense.—Where accused is justified on the ground of self-defense depends on whether he believed, on reasonable grounds, that it was necessary to kill deceased to avert the real or apparent danger to himself.—Weathers v. Commonwealth, Ky., 172 S. W. 107.

53. **Husband and Wife**—Joint Occupancy.—Where land conveyed by a husband to his wife was occupied by both parties as their home before and after the conveyance, the joint occupancy could not furnish a basis for a claim of prescriptive title by one against the other.—Bais v. Reed, Cal., 145 Pac. 516.

54.——Use and Occupation.—Where a legatee and her husband held over after the termination of her estate, she alone was liable for use and occupation, a claim for which was available as a set-off against her share of the proceeds on a sale of the land.—Oliver v. Epperson, Mo., 172 S. W. 424.

55. **Indictment and Information**—Grand Jury.—Where an indictment was submitted to the grand jury, by order of court, based on a presentment of the grand jury, it was not objectionable, because not based on an accusation made before a committing magistrate or commissioner, supported by oath or affirmation.—United States v. Wetmore, U. S. D. C., 218 Fed. 227.

56.——Joinder.—The offense of false swearing is not an offense in which two or more persons may participate, and hence the joinder of two defendants in an indictment for false swearing was unauthorized.—Walker v. Commonwealth, Ky., 172 S. W. 109.

57. **Injunction**—Practice.—In a suit to recover the loss occasioned by a contractor because defendant, a labor union, lowered the rate of wages without notifying the contractor, a demurrer will not lie to the prayer to enjoin the union's withdrawing certain funds in the bank, since the proper remedy is motion to dissolve.—Powers v. Journeymen Bricklayers' Union No. 3, Tenn., 172 S. W. 284.

58. **Innkeepers**—Ordinary Care. — An innkeeper should exercise a degree of care for the safety of his guests reasonably commensurate with the circumstances.—Seay v. Plunkett, Okla., 150 Pac. 496.

59. **Insurance**—Assignment. — An assignment of a life policy by an uncle to his niece, under an agreement that the niece should pay the premiums and collect the proceeds held void.—Equitable Life Assur. Society v. O'Connor's Adm'r, Ky., 172 S. W. 496.

60.——Insane Person.—An offer of an insurance company to issue new policies to policy holders of an insolvent company held limited to such holders personally, and could not be accepted for an insane policy holder by his guardian.—Robinson v. Postal Life Ins. Co., U. S. C. C. A., 218 Fed. 347.

61.——Lex Loci Contractus.—Provisions of certificate limiting time to sue held governed by laws of state where member resided and local lodge of which he was a member was situated when the certificate was issued.—Simmons v. Modern Woodmen of America, Mo., 172 S. W. 492.

62. **Intoxicating Liquors**—"Blind Tiger."—The definition of a "blind tiger" in Acts 1914, No. 146, is controlled by the phrase "in connection with any business conducted in such place," whether the liquor is kept for sale or to be given away.—State v. Mackie, La., 67 So. 25.

63.——Prohibition.—Prohibition did not go in force, in the precinct in which an election had been held, until publication of the order was made by the judge.—Rhodes v. State, Tex., 172 S. W. 252.

64. **Judicial Sales**—Jurisdiction.—Where the chancellor permitted the purchase money to be collected on condition that a refunding be given, he had jurisdiction on failure of title to recall such money.—Galloway-Pease Co. v. Sabin, Tenn., 172 S. W. 292.

65. **Landlord and Tenant**—Description. — A lease of premises, described as a strip out of a designated survey lying west of and adjoining a survey named containing 115 acres, does not describe the land.—Ratliff v. Wakefield Iron & Coal Land Improvement Co., Tex., 172 S. W. 198.

66.——Estoppel.—Where a lessor fraudulently misrepresented the character of the land, the lessee, who relied upon his statements, is not estopped to rescind because the lease recited that he had inspected the land and was satisfied with it.—Robey v. Craig, Tex., 172 S. W. 203.

67.——Eviction.—The measure of damages to a tenant on shares, resulting from his eviction by the landlord, is the value of the crops he could probably have raised, less the expense of raising them and less his reasonable earnings after the eviction.—Bost v. McCrea, Tex., 172 S. W. 561.

68.——Trespass.—The remedy of a renter of a room from the tenant of the house, against an agent of the owner who forcibly removed his property therefrom, is by ordinary trespass, not forcible entry and detainer, under Rev. St. 1909, § 7656.—Strauel v. Lubeley, Mo., 172 S. W. 434.

69. **Lis Pendens**—Notice.—Where fraud was alleged in the sale of the land of a ward, subsequent purchasers, buying long after lis pendens notice had been properly filed and made of record, were in no better position than their vendor.—Gillispie v. Darroch, Ind., 107 N. E. 475.

70. **Malicious Prosecution** — Compensatory Damages.—The elements of compensatory damages in an action for malicious prosecution include loss of time, peril to life and liberty, injury to fame, reputation, and health, mental suffering and decrease in earning power.—Black v. Canadian Pac. Ry., U. S. D. C., 218 Fed. 239.

71. **Mandamus**—Jurisdiction.—Where the probate court determined from the law of the case that it had no jurisdiction to order a partial payment to a ward pending exceptions to final settlement, mandamus could compel it to take jurisdiction and determine the application on the merits.—State v. Shackelford, Mo., 172 S. W. 347.

72. **Marriage**—Common Law.—To constitute a common-law marriage, the parties must unconditionally agree to live together as husband and wife during their lives, and live together and cohabit as such and so hold themselves out to the public.—Whitaker v. Shenault, Tex., 172 S. W. 202.

73. **Master and Servant**—Assumption of Risk.—Where employe suggested to employer's superintendent that the horse known to be vicious be placed in a box stall, but was told that if he was careful he would not be hurt, held that he did not assume the risk of injury from being kicked by the horse.—Moore v. American Express Co., Mo., 172 S. W. 416.

74.——Assumption of Risk.—Assumption of risk is confined to relation of master and servant, and a servant assumes the risks ordinarily incident to the work after the master has observed ordinary care in providing a reasonably safe place and appliances.—Fish v. Chicago, R. I. & P. Ry. Co., Mo., 172 S. W. 340.

75.——Assumption of Risk.—Unless the danger be obvious, the defenses of assumption of risk do not apply, where the injured employe was performing his work in the usual manner.—Collins v. Krause-Managan Lumber Co., La., 67 So. 12.

76.——Course of Employment.—Death of cook on a lighter from heart disease, aggravated by his exertions in saving his effects from the sinking lighter, held an "injury arising out of and in the course of employment," within Workmen's Compensation Act.—In re Brightman, Mass., 107 N. E. 527.

77.——Hours of Service Act.—Where government showed that railway firemen were on duty more than 16 consecutive hours, defendant held to have burden of proving facts defeating liability, within the proviso of Hours of Service Act, § 3.—Great Northern Ry. Co. v. United States, U. S. C. C. A., 218 Fed. 302.

78.——Jury Question.—Where an employe, on suit for breach of his contract, claimed that outside earnings should not be deducted from defendant's liability, whether such work was inconsistent with his obligation under the contract held for the jury.—Breakwater Co. v. Donovan, U. S. D. C., 218 Fed. 340.

79.——Licensee.—A railroad employe walking along the tracks from work to the boarding cars where he lived, held in the employ of the company and entitled to protection as such.—Louisville & N. R. Co. v. Walker's Adm'r, Ky., 172 S. W. 517.

80.——Ordinary Employment.—When a servant is taken by the master from his ordinary employment and put at work that he never before has done, there rests upon the master the duty of instructing the servant with respect to the methods and the dangers of the new kind of work, and such duty is an absolute one, for the performance of which the master is personally responsible.—Freedom Casket Co. v. McManus, U. S. C. C. A., 218 Fed. 323.

81.——Proximate Cause.—Where by contractor's failure to lay a floor on the second story of a building, as required by Acts 1911, c. 236, § 2, plaintiff fell from the third to the first story, the violation of a statute sufficiently appeared to have been the proximate cause of injury.—Suelzer v. Carpenter, Ind., 107 N. E. 467.

82. **Mines and Minerals**—Presumption of Law.—Where a patent has been issued for a mining claim, there is a conclusive presumption that there is a discovery vein therein, that the claim was properly located thereon, and that all precedent acts necessary to authorize the issuance of the patent had been performed.—Stewart Mining Co. v. Bourne, U. S. C. C. A., 218 Fed. 327.

83. **Mortgages**—Ratification.—Where a deed requiring the grantee to pay a mortgage was executed and recorded without his knowledge, the mortgagee cannot, the grantee not having ratified the conveyance, recover against him personally.—Llewellyn v. Butler, Mo., 172 S. W. 413.

84. **Municipal Corporations**—Abuse of Discretion.—Where a city exercises its police power, the means appropriate to the exercise rest in the discretion of the city, and courts will not interfere in the absence of a clear abuse of discretion.—Detamore v. Hindley, Wash., 145 Pac. 462.

85.——Negligence.—Where a person drives an automobile at night in a dark place so fast that he cannot stop or avoid an obstruction within the distance lighted by his lamps, he is guilty of negligence.—West Const. Co. v. White, Tenn., 172 S. W. 301.

86.——Negligence.—One injured by a runaway horse may rest on a prima facie inference of negligence from it having been left unhitched on the street, though the question of negligence remains for the jury.—Rosenberg v. Dahl, Ky., 172 S. W. 113.

87.——Negligence.—Though plaintiff, attempting to cross a wire which city employes were winding on a reel, was negligent, yet, if such employes, knowing of his danger, could have avoided injury, but failed to do so, their negligence was the proximate cause, rendering the city liable.—Gladen v. City of Seattle, Wash., 145 Pac. 418.

88.——Negligence per se.—A pedestrian, who in the daylight, with knowledge of the rounded condition of a curb, elected to walk thereon to avoid the mud, when by taking a few steps to either side she could have avoided both, held negligent as a matter of law.—Werthner v. Girard Ave. Farmers' Market Co., U. S. C. C. A., 218 Fed. 364.

89. **Negligence**—Presumption.—In the absence of proof of negligence, the legal presumption that the injury complained of was not due to any fault of defendant arises where the doctrine of res ipsa loquitur is inapplicable.—Tawney v. United Rys. Co. of St. Louis, Mo., 172 S. W. 8.

90. **Nuisance**—Right of Way.—The placing by a railroad company of bunk cars, for the use of its laborers, upon its right of way adjacent to plaintiff's property, does not of itself create a nuisance.—Excelsior Products Mfg. Co. v. Kansas City Southern Ry. Co., Mo., 172 S. W. 359.

91. **Railroads**—Last Clear Chance.—A recovery under the last clear chance doctrine for death at a railroad crossing can only be based on proof that decedent was in a position of danger for a sufficient length of time to have enabled the engineer to have prevented the accident.—Whitesides v. Chicago, B. & Q. R. Co., Mo., 172 S. W. 467.

92.——Licensee.—A person crossing an interurban track from a station to a platform to take an approaching car is not required to exercise the same care for his safety as a trespasser or person at a highway crossing.—Meierhoff v. United Rys. Co. of St. Louis, Mo., 172 S. W. 402.

93.——Proximate Cause.—Though river overflowed plaintiff's land, if railroad company by altering drains caused a greater overflow, which, with the water from the river, caused damage, railroad company held liable.—Chicago, R. I. & P. Ry. Co. v. Hankins, Ark., 172 S. W. 255.

94.——Variance.—In an action for the death of a pedestrian at a crossing, proof that deceased was crossing in one direction is not a material variance from an allegation that he was crossing in the opposite direction.—Texas & P. Ry. Co. v. Marrujo, Tex., 172 S. W. 588.

95.——Warning.—A railroad company, independent of statute or ordinance, is bound to give timely warning of the approach of trains at a town crossing.—Pittsburgh, C. C. & St. L. Ry. Co. v. Macy, Ind., 107 N. E. 486.

96. **Sales**—Notice.—Where one signing an order for merchandise to be furnished by another notified the latter before acceptance not to ship the goods, there was no enforceable contract.—Outcalt Advertising Co. v. Wilson, Mo., 172 S. W. 394.

97. **Schools and School Districts**—Action by.—A board of school directors has no authority to sue for property donated to a private academy for school purposes and sold by the trustees of the academy after the expiration of its charter.—Board of Directors of Public Schools of Caldwell Parish v. Louisiana Central Lumber Co., La., 67 So. 23.

98. **Stipulations**—Filing.—The parties, by stipulating that supplemental answer changing the issues filed subsequent to the trial might be considered as filed prior to the trial, could not bind the court, or require the appellate court to consider questions not considered by the trial

court.—Great Northern Ry. Co. v. United States, U. S. C. C. A., 218 Fed. 302.

99. **Sunday**—Verdict on.—Where adjourned term was convened upon adjournment of regular term on Saturday, and case was then placed on trial, held that there was no objection to the return of a verdict on Sunday; it being within the term.—Town of Athens v. Miller, Ala., 66 So. 702.

100. **Taxation**—Suit on Bond.—Where a deputy tax collector negligently failed to collect taxes, the tax collector, in an action on the deputy's bond, cannot recover the amount of the taxes not collected, but only the amount which he was damaged by his deputy's failure. Stearns v. Edmonds, Ala., 66 So. 714.

101. **Telegraphs and Telephones**—Incorrect Address.—If the specific address on a message, when given a telegraph company to transmit, is an impossible or incorrect one, the company is not liable for delay in delivery proximately caused thereby.—Western Union Telegraph Co. v. Smith, Ala., 66 So. 578.

102. **Trade-Marks and Trade-Names**—Expiration of Patent.—Where the Whitneys, manufacturing a car wheel under the Faught patent, sold it as such, the public did not, on expiration of the patent, acquire right to use the name "Whitney" in such manufacture.—Sanford-Day Iron Works v. Enterprise Foundry & Machine Works, Tenn., 172 S. W. 537.

103. **Trade Unions**—Contract.—A labor union organized to regulate the wages of its members and protect them in their contracts and the promotion of their interests as laboring people is lawful.—Powers v. Journeymen Bricklayers' Union, No. 3, Tenn., 172 S. W. 284.

104. **Trespass to Try Title**—Confession and Avoidance.—A defendant in trespass to try title may, under pleas of the general denial, not guilty, and a special defense, prove any fact in rebuttal of plaintiff's testimony, but cannot introduce evidence in confession and avoidance, except as pleaded.—Parker v. Schrimsher, Tex., 172 S. W. 165.

105. **Trial**—Findings.—Where, on an issue of estoppel against the widow to allege a breach of an antenuptial contract by her husband since deceased, the court made a general finding that she was estopped, which was sustained by the evidence, the court did not err in failing to expressly find that her failure to exercise her right to rescind during the husband's lifetime was not caused by his undue influence.—In re Warner's Estate, Cal., 145 Pac. 504.

106. **Trover and Conversion**—Measure of Damages.—The measure of damages is ordinarily the value of the property at the time of the conversion with interest, but, if the evidence shows fluctuation in value, the jury may fix the highest price between the conversion and the time of trial.—Jones v. White, Ala., 66 So. 605.

107. **Trusts**—Bonus.—Under pamphlet issued by real estate promoter and contracts with purchasers, donation of bonus to first railroad through the land, held absolute, regardless of any agreement between him and trustees of the fund.—West Texas Bank & Trust Co. v. Matlock, Tex., 172 S. W. 162.

108.——Evidence.—Evidence of declarations of the grantor introduced to show a parol trust held admissible, though the witness could not give the exact language or exact date.—Hambleton v. Southwest Texas Baptist Hospital, Tex., 172 S. W. 574.

109.——False Representation.—Where an agent fraudulently took title to the premises in the name of his infant son and thereafter purported to convey them to his principal in his own name, reciting the conveyance to be of the same land as was conveyed to him, the son is liable for the representation made by the recital.—Fowler v. Alabama Iron & Steel Co., Ala., 66 So. 672.

110.——Resulting Trust.—A parol agreement that defendant, who bought in property at foreclosure, taking title in himself, should hold it in trust for plaintiffs and convey it to them on certain payments, being made, is enforceable and creates a valid trust.—Lutz v. Hoyle, N. C., 83 S. E. 749.

111.——Statute of Frauds.—Where a party to an oral trust induced the trustee to convey the entire property to her in fraud of the other beneficiaries, the statute of frauds cannot be asserted as a bar.—Reardon v. Reardon, Mass., 107 N. E. 522.

112. **United States**—Surety on Bond.—Surety on bond of contractor for public building, held liable for damages sustained through contractor's default, though the government entered into an entirely new contract with a third person for different work.—United States v. United States Fidelity & Guaranty Co., 35 Sup. Ct. Rep. 298.

113. **Vendor and Purchaser**—Option.—The phrase "at any time during the life of this option," in a contract to convey land, means during the time in which the contract of sale was to be consummated by a conveyance for a stated price.—Charbonier v. Arbona, Fla., 67 So. 41.

114.——Rebuttable Presumption.—Knowledge of vendor and purchaser that the lien of a purchase-money note could not be removed might well raise the presumption that it was not contemplated that it should be removed, rebuttable, however, by proof to the contrary.—Riggins v. Post, Tex., 172 S. W. 210.

115.——Rescission.—Where defendant asked to have his contract of purchase rescinded for fraud by plaintiff's agent and for damages, judgment for defendant reversed, with directions to enter judgment for the plaintiff.—Connecticut Mut. Life Ins. Co. v. Guseman, Mo., 172 S. W. 396.

116. **Waters and Water Courses**—Confiscatory Rates.—That the owner of a water system did not produce any evidence as to the value of the property before a state commission, which subsequently made an order fixing rates to be charged to customers of such system, does not estop him to deny the fairness of the valuation made by the commission, or to claim that the rates made are confiscatory.—Van Dyke v. Geary, U. S. D. C., 218 Fed. 111.

117.——Railroad Bridge.—A railway company which places a bridge across an unnavigable stream must provide for the undisturbed passage of all water reasonably to be anticipated.—State v. Minneapolis, St. P. & S. S. M. Ry. Co., N. D., 150 N. W. 463.

118. **Wills**—Construction.—Where an estate is given to one generally or indefinitely, with power of devise, the gift carries the entire estate, and the devisee or legatee takes, not a simple power, but the property absolutely.—Brandau v. McCurley, Md., 92 Atl. 540.

119.——Construction.—Relative to whether testator's daughter took a fee, or only a life estate, with remainder to her children, a subsequent clause giving a valuation of her land and advancement sheds no light.—Burns v. Moseley, Ky., 172 S. W. 521.

120.——Undue Influence.—Persuasion whereby testator was induced to make his will differently from the way he would otherwise have made it, where not overriding the will of testator, does not amount to undue influence.—Posy v. Donaldson, Ala., 66 So. 662.

121. **Witnesses**—Cross-Examination.—A witness having identified a smooth quarter found in defendant's possession, as an incriminating circumstance, the court did not err in limiting the cross-examination to the means by which he assumed to distinguish the coin from any other like coin.—People v. Warner, Cal., 145 Pac. 545.

122.——Impeachment.—Proof that prosecutrix, since deceased, whose testimony given at the preliminary hearing was read, had been under investigation by a federal grand jury, and in difficulty with local authorities, was incompetent to impeach her.—State v. Baker, Mo., 172 S. W. 350.

123.——Rebuttal Evidence.—Where the state on the cross-examination of a witness for accused showed that the witness was biased in favor of accused, accused should be permitted to show that the witness and decedent supported the same candidate at an election.—Edwards v. State, Tex., 172 S. W. 227.